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No. 82-374

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT FLANAGAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

JAMES KEWESHAN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

JOSEPH LANDIS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

THOMAS McNAMEE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. A PRE-TRIAL ORDER DISQUALIFYING COUNSEL CHOSEN BY A DEFENDANT IN A CRIMINAL ACTION IS IMMEDIATELY APPEALABLE UNDER 28 U.S.C. §1291

A defendant's constitutional right to counsel of choice in a criminal action is irretrievably lost if appellate courts lack pre-trial jurisdiction to reverse a trial court's disqualification of a defendant's chosen attorney. Absent such pre-trial appellate review, a defendant would be compelled to stand trial with counsel other than counsel of his choice, a deprivation of extraordinary significance which cannot be cured by post-trial appellate review.

The compelling need for immediate appellate review of such disqualification decisions is clear given the irremediable constitutional deprivations of a criminal defendant's rights which would inevitably result in those

instances where that decision is erroneous.[1] If a defendant is forced to stand trial with substitute counsel, his Sixth Amendment right to counsel of his choice has been eradicated. If acquitted, a defendant has nonetheless been denied counsel of choice, which denial cannot be redressed. More significantly, if convicted after trial with substitute counsel, a defendant who successfully establishes on appeal that the trial court's disqualification order was erroneous, may nevertheless be without a remedy. Were second or third choice counsel marginally competent, no conviction would be overturned because the defendant could not demonstrate prejudice arising from the disqualification ruling. Indeed, unless this Court holds that any conviction returned after a wrongful disqualification of counsel of choice is presumptively prejudicial and necessarily requires a retrial, a defendant is without any remedy following the erroneous disqualification of his chosen attorney. And even were this Court to presume prejudice, the effects of representation at trial by substitute counsel may yet be irreparable. For example, on retrial, counsel would not be able to undo various consequences of representation by substitute counsel, such as the defendant's decision to testify, to produce or not to produce alibi witnesses, or to waive the right to inspect and analyze physical evidence, subsequently destroyed prior to retrial. Furthermore, the intangible harm which may result from substitute coun-

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1. Non-constitutional issues also require that such disqualification be immediately reviewable. For example, economic considerations may directly affect a defendant's ability to retain even second or third choice counsel. In addition, questions of time between a trial court disqualification of chosen counsel and trial on the merits may also preclude second or third choice counsel from providing proper representation to a defendant. Further, due to a long-standing relationship which may exist between client and counsel or counsel's involvement in and familiarity with the particular facts of the prosecution, counsel's unique ability to provide representation to the client must be accorded substantial weight.

sel's handling of a first trial, such as attitudes formed by the court, prosecution and/or defense witnesses towards the defendant and his case based solely upon the demeanor, strategy and performance of substitute counsel, may be irremediable.

A review of the decisions of this Court and of the rulings of those Circuit Courts that have considered the precise jurisdictional question at issue, and application of practical considerations to the question posed, make it clear that overwhelming authority exists establishing the jurisdiction of courts of appeals over pre-trial orders disqualifying counsel in a criminal action.

A. The Decisions Of This Court Support The Conclusion That Lower Court Orders Disqualifying Chosen Counsel In A Criminal Case Are Immediately Appealable

The jurisdiction of the Courts of Appeals is limited to "final decisions of the District Courts," pursuant to 28 U.S.C. §1291. This Court has read that statute to permit interlocutory appeals from orders falling within the "collateral order" exception first delineated in *Cohen v. Beneficial Industrial Corp.*, 337 U.S. 541, 545-547 (1949). To be immediately appealable under §1291 , such collateral orders "must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The *Cohen* rule has been applied by this Court in criminal cases. In *Stack v. Boyle*, 342 U.S. 1, 6 (1951), a lower court order denying a motion to reduce bail was, under the teaching of *Cohen*, held to be "appealable as a 'final decision' of the District Court under 28 U.S.C. §1291." Obviously, the denial of a motion to reduce bail conclusively determined the question and resolved an important issue completely separate from the merits of the action. Respecting the third prong of the *Cohen* test,

that the "collateral order" be effectively unreviewable on appeal from a final judgment, *Stack* is instructive. Had defendants gone to trial and been acquitted, no appellate review of the bail order would ever have occurred, even had that order been erroneous and despite the resultant unconstitutional deprivation. Had defendants gone to trial and been convicted, the propriety of the District Court's determination could have been reviewed on appeal. However, even if the appellate court found that the bail ruling was in error, no remedy would be available to defendants. Therefore, the term "effectively unreviewable," as formulated in *Cohen*, must necessarily mean that the reviewing court would be powerless to provide to the defendant full redress for the constitutional infringement suffered by him.

In *Abney v. United States*, 431 U.S. 651 (1977), this Court held that a District Court's pretrial order denying a motion to dismiss an indictment on double jeopardy grounds was a final decision, immediately appealable pursuant to 28 U.S.C. §1291 and *Cohen*. Applying the three-pronged test of *Cohen*, the Court, through Chief Justice Burger, found, despite the fact that the District Court's order could be reviewed on appeal if a conviction ensued, that the order would be "effectively unreviewable" at that time given the nature of the right at issue:

> "[T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense. . . .
>
> "[T]he guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests totally

> unrelated to the propriety of any subsequent conviction. . . .
>
> "Consequently, if a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." *Id.* at 661-663.

As with *Stack*, *Abney* recognized that, were review of the double jeopardy question delayed until after conviction, the constitutional right asserted would be irretrievably lost and the defendant could not be made whole. Therefore, pre-trial appellate proceedings were required to assure effective appellate review.

In *Helstoski v. Meanor*, 442 U.S. 500 (1979), this Court held that 28 U.S.C. §1291 provided Courts of Appeals with jurisdiction to consider a District Court denial of a motion to dismiss an indictment based on a former congressman's assertion of immunity under the Speech or Debate Clause of the Constitution. In an opinion authored by Chief Justice Burger, this Court relied heavily upon *Abney* in holding:

> "[T]he Speech or Debate Clause was designed to protect Congressmen 'not only from the consequences of litigation's results but also from the burden of defending themselves'. "Here, the holding of *Abney* becomes highly relevant; by analogy, if a Member 'is to avoid *exposure* to [being questioned for acts done in either House] and thereby enjoy the full protection of the Clause, his . . . challenge to the indictment must be reviewable before . . . exposure [to trial] occurs.' *Abney*, *supra*, 431 U.S. at 662." *Id.* at 508.

Helstoski, like *Stack* and *Abney*, held not only that the first two prongs of the *Cohen* test were met, but also that the District Court's denial of the motion to dismiss the indictment was "effectively unreviewable on appeal" be-

cause, even were there a conviction, the right asserted would be irretrievably eradicated were the congressman forced to stand trial.[2]

In *United States v. MacDonald*, 435 U.S. 851 (1978), this Court ruled that a trial court's order denying a motion to dismiss an indictment on speedy trial grounds was not appealable under 28 U.S.C. §1291. Writing for the Court, Justice Blackmun noted that the facts necessary to determine the motion would be best illuminated after trial, so that the first two prongs of the *Cohen* test had not been met. He also recognized that the third *Cohen* prong, whether the issue would be "effectively unreviewable on appeal from a final judgment," was not satisfied:

> "Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of this Court, encompass a 'right not to be tried' which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial. If the factors outlined in *Barker v. Wingo*, [407 U.S. 514 (1972)], combine to deprive

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2. In *Helstoski*, the Congressman attempted to challenge the District Court's denial of his motion to dismiss the indictment by seeking a writ of mandamus. The writ was denied by the Court of Appeals for the Third Circuit. In affirming the Third Circuit, this Court held that mandamus does not lie where another remedy exists, specifically, an appeal under 28 U.S.C. §1291.

The government's assertions, (U.S. Br., at 34-36), that mandamus lies to correct erroneous pretrial disqualification decisions in exceptional cases, is fallacious because mandamus jurisdiction on appeal generally goes only to the authority of the lower court to act and not to the correction of discretionary decisions of the lower court, except in the most extraordinary of circumstances. *See* 9 J. Moore, *Federal Practice*, ¶110.26 at 279-90 (1983). Particularly where the trial court's disqualification order is based on a finding of a potential conflict of interest, no appellate court can employ the writ of mandamus to correct even the most glaring abuse of discretion.

> an accused of his right to a speedy trial, that loss, by definition, occurs before trial. Proceeding with the trial does not cause or compound the deprivation already suffered." *Id.* at 862.

Since the existence of the constitutional deprivation claimed in *MacDonald* could not be determined until the full record had been made at trial, and, most significantly, since the deprivation already suffered — the right protected by the Speedy Trial Clause — would not be compounded by forcing the defendant to stand trial prior to appellate review, the holding in *MacDonald* is consistent with those of *Stack*, *Abney*, and *Helstoski*. Indeed, not only may the speedy trial issue be objectively and effectively reviewed after trial, but also, the right asserted in *MacDonald* could be fully vindicated in a post-trial appeal proceeding by reversal of the conviction.

Each of the cases discussed above teach that where the right protected would be lost if appeal is delayed until after trial, or where proceeding with the trial, prior to appeal, would cause or compound the deprivation of the right asserted, the trial court's order is immediately appealable pursuant to 28 U.S.C. §1291.

Given this analysis, it is clear that a trial court's pre-trial order disqualifying each Petitioners' chosen counsel and preventing such counsel from presenting a common defense in a criminal case is immediately appealable. Each of the three prongs of the collateral order doctrine established in *Cohen* is plainly met.[3] More-

3. The government's argument that a disqualification order does not satisfy the second aspect of the *Cohen* test because "any meaningful review of the District Court's determination is inextricably bound up with the conduct of the criminal trial" [U.S. Br., at 30-31] is pure sophistry. The propriety of the trial court's disqualification decision cannot be justified by recourse to the trial record. The record on appeal of a trial court's disqualification decision is limited to the record extant at the time the decision was rendered. Parenthetically, the fallacy of the government's contention that a *potential* conflict permits disqualification is apparent. A trial court's

over, proceeding to trial absent appellate review compounds the deprivation of a defendant's right to counsel by compelling him to stand trial with counsel other than counsel of his choice.

The very right which the Sixth Amendment affords to a defendant — the right to be represented at trial by counsel of his choice — is effectively and irrevocably denied once that defendant is forced to trial without counsel of his choice. If that right "is to be enjoyed at all," *MacDonald, supra,* 435 U.S. at 862, it must be vindicated prior to the inception of trial.

In this case, if Petitioners are forced to go to trial with substitute counsel, and are acquitted, the deprivation of their Sixth Amendment right to counsel of choice is nonetheless real, albeit remediless. More important, however, is the fact that if Petitioners are convicted after trial with substitute counsel, and even if Petitioners successfully establish, on appeal, that the trial court's order violated their Sixth Amendment right to counsel of choice, they will, nevertheless, still be without any effective remedy. In *United States v. Morrison,* 449 U.S. 361 (1981), *reh. denied,* 450 U.S. 960 (1981), this Court held that a violation of a defendant's Sixth Amendment right to counsel would not result in a dismissal of an indictment, absent a showing of prejudice. In *Morrison,* two federal agents, aware of the fact that the defendant had been indicted and had retained counsel, met and conversed with the defendant without the knowledge or permission of her counsel and disparaged her counsel to her. Defendant sought dismissal of the indictment based upon the agents' violations of her Sixth Amendment right to counsel. The District Court's denial of that motion was appealed to the Third Circuit which concluded

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NOTE — *(Continued)*
"prediction" that a potential conflict exists among the defendants can never be disproved, regardless of what occurs at trial, since that potential for conflict may always be present even though it never ripens into an actual conflict.

that, since the defendant's right had been violated "whether or not any tangible effect on respondent's representation had been demonstrated or alleged," *id.* at 363, the appropriate remedy was dismissal.

In reversing and remanding the Third Circuit's ruling in *Morrison*, this Court assumed that the defendant's Sixth Amendment rights had been violated but, nonetheless, concluded that dismissal was an inappropriate remedy given the absence of any showing of resultant prejudice to the defendant:

> "Here, respondent has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of her counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted. The Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison, much less the drastic relief granted by the Court of Appeals." *Id.* at 366-367.

The rationale of *Morrison* strongly suggests that were Petitioners in this case convicted after trial with substitute counsel and, on appeal, a court were to determine that the District Court erred in disqualifying chosen counsel from representing Petitioners herein, absent a specific showing of prejudice or adverse effect on substitute counsel's performance, the Petitioners would nevertheless not be entitled to a new trial with counsel of their choice. *See, Cuyler v. Sullivan*, 446 U.S. 335 (1980). Thus, if a review of the trial record were to disclose that substitute counsel was not ineffective, it is submitted that no retrial would be granted. For this additional reason, the constitutional right to counsel of choice must be addressed prior to the inception of trial if that right is to be vindicated. As is discussed, *infra*, since the issue in

this case is not one of effective assistance but of a defendant's right to counsel of his choice, the necessity for immediate appellate review is clear.

In the face of this analysis, Respondent relies on two cases, neither of which supports its position. In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court held that orders *denying* motions to disqualify the opposing party's counsel in a civil case are not appealable final decisions under 28 U.S.C. §1291, that such orders are effectively reviewable on appeal after final judgment, and that:

> ". . . the order embodying such a decision will rarely, if ever, represent a final rejection of the claim of fundamental right that cannot effectively be reviewed following judgment on the merits." *Id.* at 377.

Here, to the contrary, disqualification of counsel is a final rejection of the claim of fundamental right. Perhaps in recognition of this fact, *Risjord*, in holding that the *denial* of the motion to disqualify counsel in a civil case was not appealable, expressly limited its holding to such a circumstance. *Id.* at 370 n.8. All *Risjord* holds is that in a civil case, where no Sixth Amendment right to counsel of choice adheres, a pre-trial order denying a motion to disqualify counsel is not immediately appealable.[4]

The other case on which the United States primarily relies is *United States v. Hollywood Motor Car Co., Inc.*, 102 S.Ct. 3081 (1982). In *Hollywood Motor Car*, this Court held that the denial of a motion to dismiss an indictment based on grounds of vindictive prosecution is

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4. As will be seen in Section B, *infra*, the Courts of Appeals which have considered whether *Risjord's* holding is applicable to orders *granting* motions to disqualify counsel in *criminal* cases have, with but one suspect exception, determined that *Risjord* does not and should not apply.

not immediately appealable as a final decision under 28 U.S.C. §1291. In so holding, the Court noted that the right to be free from vindictive prosecution "is simply not one that must be upheld prior to trial if it is to be enjoyed at all." *Id.* at 3085. In so concluding, this Court compared a vindictive prosecution claim to the speedy trial claim raised in *MacDonald*:

> "The nature of the speedy trial right was such that '[p]roceeding with a trial does not cause or compound the deprivation already suffered.' *Id.*, at 861." *United States v. Hollywood Motor Car, Inc., supra,* 102 S.Ct. at 3085.

Were the prosecution vindictive, such taint occurred at its inception. Standing trial absent appellate review neither creates nor expands the taint. The claim of vindictive prosecution can be objectively reviewed and quantified following a conviction and if the prosecution is found to be vindictive, the conviction would be automatically overturned. *North Carolina v. Pearce*, 295 U.S. 711 (1969); *Blackledge v. Perry*, 417 U.S. 21 (1974). Thus, the right asserted in *Hollywood Motor Car* is not irretrievably lost by requiring the defendant to stand trial, nor is the deprivation suffered by the defendant compounded if appellate review is delayed until after trial.

Thus, rather than supporting Respondent herein, both *Risjord* and *Hollywood Motor Car*, by their holdings and rationales, support the conclusion that the trial court's disqualification order in this case is an appealable order under 28 U.S.C. §1291.

B. The Overwhelming Circuit Court Authority Holds That Pre-Trial Disqualifications Of Criminal Defendants' Chosen Counsel Are Immediately Appealable

The Second, Third, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits have either expressly or without

discussion determined that pre-trial appellate jurisdiction exists over trial court orders disqualifying criminal defendants' chosen counsel. These decisions, filed both prior and subsequent to the decisions of this Court in *Risjord* and *Hollywood Motor Car*, compellingly establish the propriety of such a determination.

In *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982), the Second Circuit pre-trial reversed a District Court order disqualifying counsel for defendants on grounds of conflict of interest, tersely noting that "orders disqualifying counsel are immediately appealable." *Id.* at 1066. In *United States v. Curcio*, 694 F.2d 14 (2d Cir. 1982), the same court again had the opportunity to consider whether a trial court's disqualification of a criminal defendant's chosen counsel was immediately appealable under 28 U.S.C. §1291. In reaffirming *Cunningham*, and in rejecting the very same arguments which are advanced by the government in the matter *sub judice*, Judge Friendly clearly articulated the reasons why the order disqualifying defendant's chosen counsel should be immediately appealable. Consistent with the *Morrison* analysis set forth above, *Curcio* rested its conclusion of appealability on the fact that review after final judgment would be wholly inadequate to protect a criminal defendant's right to counsel of choice because prejudice to that defendant would not be presumed merely from defendant's inability to proceed to trial with counsel of his choice:

> "[T]here are indications in our cases that prejudice might not be presumed from the erroneous disqualification of defense counsel. If so, [defendant] might well be required on appeal to show that he would not have been convicted had he not been deprived of his chosen counsel. *This burden would be well-nigh 'insurmountable,' and thus the order disqualifying [counsel] would be 'effectively unreviewable on appeal from a final judgment'.*"

United States v. Curcio, supra, 694 F.2d at 20. (Emphasis Added) (Citations omitted)

In *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), the Third Circuit held that it had jurisdiction pursuant to 28 U.S.C. 1291 to hear a pre-trial appeal from a trial court's order disqualifying counsel chosen by a criminal defendant. Four and a half years later, in the case *sub judice*, decided subsequent to *Risjord*, the Third Circuit again held that it had such jurisdiction:

> "We have jurisdiction to hear appeals from District Court orders disqualifying counsel under 28 U.S.C. 1291 inasmuch as such matters are 'collateral orders' within the meaning of *Cohen v. Beneficial Industrial Loan Corp.*, 347 U.S. 541 (1949). . . . These holdings are not affected by *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 372 n.8 (1981)." PA 5.

In *United States v. Phillips*, 699 F.2d 798 (6th Cir. 1983), yet another post-*Risjord* decision, the Court of Appeals for the Sixth Circuit held that a trial court order granting the government's motion to disqualify a criminal defendant's chosen counsel was immediately appealable under §1291,[5] basing its holding on:

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5. In *United States v. Duklewski*, 567 F.2d 255 (4th Cir. 1977), the Fourth Circuit, without discussion, assumed jurisdiction over an appeal by a defendant from a denial of his motion to release to him and his counsel information provided to the District Court by the United States Attorney which formed the basis of the trial court's determination that counsel discontinue his representation of the defendant. In *United States v. Smith*, 653 F.2d 126 (4th Cir. 1981), the court also assumed pre-trial jurisdiction over an order disqualifying defendant's chosen counsel on conflict of interest grounds, and reversed the order. In *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975), the Fifth Circuit reversed a trial court order disqualifying chosen counsel from representing criminal defendants, held that such an order was appealable pretrial pursuant to the three prong test set forth in *Cohen*, and stated, "Deferral of review until after completion of the trial would dissipate judicial resources and possibly jeopardize the defendants' case by prohibiting representation at trial by counsel of their choice." *Id.* at 275.

> "*[t]he nature of the constitutional right involved and the pervasive effect of a disqualification order on the proceedings*. . . . To require a defendant in a criminal case to stand trial and risk conviction while deprived of the services of his chosen counsel without an opportunity to test the legality of the order of disqualification is fundamentally unfair. . . . *From the time of disqualification the defendant's case is affected by the loss of an attorney in whom he has confidence*. Even a most competent counsel who enters the picture following disqualification of the attorney first selected by the defendant labors under severe handicaps. A defendant erroneously deprived of the fundamental constitutional right to counsel of his choice should not be required to endure the rigors of trial and obloquy of conviction before establishing that error has been committed." *Id.* at 802. (Emphasis added.)

In *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982), *cert. denied* after remand and subsequent affirmance *sub nom. Gustafson v. United States*, 103 S.Ct. 77 (1983), the Eighth Circuit, despite the reversal of its decision in *Risjord*, nonetheless found a pre-trial order disqualifying a criminal defendant's chosen counsel to be immediately appealable. Finally, in *United States v. Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied* 103 S.Ct. 208 (1982), the Eleventh Circuit held that a District Court order disqualifying counsel chosen by a defendant in a criminal case is a final order appealable under 28 U.S.C. §1291.[6]

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6. Similarly, in *Ah Ju Steel Co., Ltd. v. Armco, Inc.*, 680 F.2d 751 (USCCPA 1982), the Court of Customs and Patent Appeals held that it had jurisdiction, under 28 U.S.C. §1291, to consider pre-trial the propriety of an order disqualifying a party's chosen counsel in a civil case, relying in part on post-*Risjord* cases which have reaffirmed the appealability of such orders. *Id.* at 753 n.4.

Arrayed against this overwhelming weight of authority is but one case which is itself suspect for the flawed premise on which it rests and which has been questioned by the same Circuit from which it issued. To that case, we will now turn.

C. Questioned In Its Own Circuit And Based On A Faulty Premise, *United States v. Greger* Does Not Establish The Absence Of Appellate Jurisdiction

In *United States v. Greger*, 657 F.2d 1109 (9th Cir. 1981), *cert. denied* 103 S.Ct. 1891 (1983), the defendant appealed from a pre-trial order disqualifying counsel of his choice, which order was entered after a Rule 44(c) hearing at which Greger *refused* to waive his Sixth Amendment right to conflict-free representation and at which Greger's defense counsel stated that he would not ask potential witnesses against Greger, who were and had been current and former clients of defense counsel, to waive their attorney-client privileges. The Ninth Circuit dismissed the appeal for want of a final order under 28 U.S.C. §1291.[7]

Relying on *Risjord*, and focusing on the third prong of the *Cohen* test for an appealable "collateral order," a panel of the Ninth Circuit found that "Greger's 'plainly adequate' remedy is to obtain review of this order, and other claims of error should he so desire, at the conclusion of the trial, if he is convicted." *Id.* at 1112. This conclusion was based on the panel's understanding that, if Greger was convicted and if the disqualification of counsel was found to be erroneous on appeal, then prejudice

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7. This Court denied Greger's Petition for a Writ of Certiorari only after the Respondent had filed a "Supplemental Memorandum" setting forth that trial had concluded with Greger being represented by substitute counsel, which trial "would appear to have rendered moot the question . . . whether the Court of Appeals correctly dismissed Petitioner's pretrial appeal."

to Greger would be presumed and a new trial would be required:

> "On the other hand, if the defendant is found guilty and on appeal attacks the order disqualifying his counsel, there is no reason why his right to counsel of choice cannot be vindicated on appeal. *We would agree that if the defendant were required to show on appeal that he was convicted because of new counsel, the burden would be insurmountable and a disqualification 'effectively unreviewable on appeal.'* But such a burden need not be imposed. At least in this Circuit, if the order can be shown to have been erroneous, *prejudice will be presumed.*" *United States v. Greger, supra*, 657 F.2d at 1113. (Emphasis added.)

The *Greger* panel reemphasized this central thesis: that the presumption of prejudice would necessitate a new trial, thereby curing any disability which might possibly have resulted from the erroneous disqualification order:

> "In short, we do not deal here with a right such as the right against double jeopardy, which, if it is not vindicated before trial, is irretrievably lost. Greger can obtain review of the disqualification order after trial, and secure a new trial should he persuade the appellate court that the disqualification order is in error. A new trial protects Greger's right to counsel of choice, . . . " *Id.* at 1113.

Recognizing that the burden which would be imposed on a defendant, on appeal, to demonstrate prejudice as a result of an erroneous disqualification decision would be "insurmountable," the very same conclusion reached by Judge Friendly in *Curcio*, the *Greger* panel adopted a presumption of prejudice thereby mandating the grant of a new trial in an attempt to avoid the prescriptions of

the *Cohen* test.[8] But a new trial is, nevertheless wholly inadequate to cure the pervasive effect of an erroneous disqualification of chosen counsel. The decisions and conduct of substitute counsel both restrict and prejudice the ability of chosen counsel to represent his clients at any second trial. Therefore, the *Greger* court's conclusion that, even presuming prejudice, review of a pretrial disqualification order can be delayed until after trial is clearly incorrect.[9]

Given the very nature of the lawyer-client relationship and its critical significance in formulating and shaping the tactics and strategies adopted by a defendant prior to and during trial,[10] the deprivation of the right to counsel of choice cannot be cured even if the defendant is subsequently granted a retrial with counsel of

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8. The government itself is in clear disagreement with the rationale of *Greger*, is of record in opposing any presumption of prejudice where the disqualification order is found to have been entered in error, and argues that so long as substitute counsel is not ineffective, reversal would be inappropriate. (U.S. Br., at 27-28n.26). Yet the government ignores the impossible burden which would be imposed upon a defendant who is required to demonstrate such prejudice in this context, as is well recognized in *Morrison*, *Curcio*, and even in *Greger* itself. More pertinently, the approach advanced by the government cavalierly ignores the recognized, qualitative differences which exist among counsel and a defendant's vital interest in being afforded representation at trial by counsel of his choice and in whom he has placed his trust and confidence.

9. It appears that the *Greger* panel's assumption that prejudice is to be presumed from an erroneous disqualification order was based solely on the case of *Slappy v. Morris*, 649 F.2d 718, 723 n.4 (9th Cir. 1981). No Supreme Court authority was cited for that proposition. *Slappy* was reversed by this Court, *sub nom. Morris v. Slappy*, 103 S.Ct. 1610 (1983). Although this Court's reversal was predicated on the finding that no Sixth Amendment right was violated, so that the question of prejudice need not be considered, 103 S.Ct. at 1617 n.6, the *Greger* panel's failure to address *Morrison* casts substantial doubt on the validity of its assumption even within its own Circuit.

10. *See United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979).

his choice. For example, the irremediable consequences which surely result from a defendant's decision to testify at his first trial or his decision to present or to eschew the presentation of a common defense at his first trial, all on the advice of substitute counsel, cannot be corrected even if a retrial with counsel of his choice is granted. Numerous pretrial or trial issues may be raised, litigated, and lost, admissions might be made and evidence presented, technical defenses may be raised, such as entrapment or alibi, and certain admissions of fact may follow from such decisions. Testimony at the first trial would be admissible at the retrial, and substitute counsel's errors, shortcomings or tactical judgments in handling such testimony could have a severe impact upon the ultimate outcome of any second trial. Moreover, on the advice of second counsel, a defendant may decide to plead to the charges against him, a decision which prior counsel might have vehemently opposed, and, as a result, the propriety of the trial court's disqualification order may never be reviewed.

Indeed, it is apparent that, even presuming prejudice, the potential for injury which can result from being compelled to proceed to trial with substitute counsel is substantial, as has been recognized by each of the other Courts of Appeals that has addressed this issue, and that, as in *Stack*, *Abney* and *Helstoski*, the right to be represented by counsel of one's choice is a right which must be vindicated before trial if that right is to be meaningfully protected.

In *In Re Coordinated Pretrial Proceedings, etc.*, 658 F.2d 1355 (9th Cir. 1981), *cert. denied* 102 S.Ct. 1615 (1982), the Ninth Circuit first had the opportunity to consider its earlier decision in *Greger*. In *Coordinated Pretrial*, the Court of Appeals held that an order disqualifying defense counsel from representing present and former employees of defendants in connection with a civil action was immediately appealable under §1291.

In distinguishing *Greger*, the Ninth Circuit noted that, in the civil context, the right asserted would be irretrievably lost were the order unreviewable until after entry of a final judgment and further emphasized that the remedy of a new trial after appeal from a final judgment would not adequately redress any injury. Indeed, the Court specifically stated that ". . . in a civil case, the presumption of prejudice which would mandate a new trial if error were established under the criminal law does not exist." *Id.* at 1358.

Subsequently, in *Gough v. Perkowski*, 694 F.2d 1140 (9th Cir. 1982), the Ninth Circuit reaffirmed this same position, stating:

> "The burden a party would be required to meet in order to obtain a reversal could not practicably be met after final judgment in most civil cases. The fact that counsel was improperly disqualified would not, in itself, be sufficient to warrant a new trial since, as we said in [*Coordinated Pretrial*], there is no presumption of prejudice which attaches to such disqualification. *Id.* at 1143.

The *Gough* panel discussed *Greger* in the following manner:

> "We need not reconsider our *Greger* holding here, other than to note that if it conflicted with [*Coordinated Pretrial*] we would follow the latter ruling, not because the [*Coordinated Pretrial* decision] is later in time but because of our understanding of the principles underlying the *Cohen* rule. However, we believe the decisions can be reconciled and thus refrain from any reexamination of *Greger* at this time. *Id.* at 1143 n.3.

Thus, *Greger* stands alone. In direct conflict with it are the views of seven other Courts of Appeals. Indeed, the Ninth Circuit itself has seriously questioned the *Greger* opinion and the presumption upon which *Greger*

is based.[11] The rationale of *Greger* cannot, therefore, be supported. And since a retrial with counsel of choice cannot cure the ills arising from proceeding to trial with second-choice counsel, as is noted above, even the automatic grant of a new trial upon recognition that the disqualification decision was in error is insufficient to protect a criminal defendant's right to be represented by counsel of his choice.

Therefore, for all of the reasons set forth above, Petitioners respectfully submit that pre-trial orders disqualifying counsel of choice from presenting a common defense are collateral orders subject to interlocutory appellate review and that this Court should decide this case on the merits.

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11. The *Gough* view that the *Coordinated Pretrial* and *Greger* decisions could be reconciled was based upon *Gough's* acceptance of the erroneous view that a presumption of prejudice arises where a criminal defendant is compelled to go to trial with counsel other than that of his choice and that reversal of any conviction and the grant of a new trial is automatic where the disqualification decision is overturned. However, in *United States v. Gouveia*, 704 F.2d 1116 (9th Cir. 1983) (en banc), defendants challenged their convictions, raising Sixth Amendment claims based upon their being isolated in administrative detention for extended periods of time prior to being indicted, during which time they were denied access to counsel. Only six of the eleven members of the court *en banc* deemed such a denial to constitute a Sixth Amendment violation. Most significantly, of the six members of the court who found the constitutional violation, based on *Morrison, supra*, none presumed that prejudice was to be inferred, thereby requiring a reversal or remand. Indeed, based on *Morrison*, the majority entered into a lengthy analysis of the precise nature of the taint caused by the Sixth Amendment deprivation before determining that the pre-indictment isolation absent assistance of counsel was so prejudicial as to require the reversal of the judgments of conviction.

II. THE DISTRICT COURT'S DISQUALIFICATION ORDER DEPRIVED PETITIONERS OF THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR COMMON DEFENSE IN A CRIMINAL CASE PRESENTED BY COUNSEL OF THEIR CHOICE

In their opening Brief, Petitioners demonstrated that defendants jointly charged with the commission of criminal acts have a Sixth Amendment right to choose to present a common defense through retained counsel of their choice and that Rule 44(c) cannot be a vehicle for authorizing disqualification of counsel where criminal defendants jointly charged have intelligently and voluntarily made such a decision. Further, Petitioners contended that speculation as to the existence of potential conflicts of interest arising from multiple representation of persons jointly charged could not serve as the predicate for the disqualification of chosen counsel. Petitioners further contended that where defendants jointly charged are advised of potential conflicts arising from joint representation but, nonetheless, knowingly, voluntarily, and intelligently choose to proceed to trial with chosen counsel to present their common defense, the trial court cannot disqualify counsel but must accept the defendant's decision. Moreover, given the primary predicate upon which the lower courts rested their decisions, Petitioners argued that no basis for disqualification of counsel exists where the alleged, potential conflict of interest arises from the fact that, during the course of the attorney-client relationship, information is obtained by counsel representing multiple defendants jointly charged and wishing to present a common defense; and that a necessary precondition to the presentation of a common defense, be it by one or more attorneys, is the sharing of privileged information. Thus, were the District Court and Third Circuit rulings correct, it was contended that there could be neither a common defense presented by defendants jointly charged with the com-

mission of criminal acts nor multiple representation of defendants so jointly charged.

The government has refused to respond directly to the particular issues raised in Petitioners' initial brief. Instead, the government has studiously avoided these issues by raising numerous contentions which are irrelevant to the matter *sub judice* and by asserting, without factual basis, that the standards of ethical conduct to which members of the Bar are subject have been violated in this case, thus mandating disqualification.

First, the government argues that since a defendant cannot demand that he be represented by a disbarred attorney, a lay spokesman, a lawyer unwilling to represent him, a specific public defender, or an attorney whose other commitments make it impossible for him to adhere to a reasonable trial schedule imposed by a court [U.S. Br., at 37-38, 42-47], no defendant has an absolute Sixth Amendment right to counsel of choice. Petitioners have never contended otherwise and none of these factors are relevant to any determination of the issues raised herein. Furthermore, to say that the constitutional guarantee to counsel of choice is not absolute does not suggest that it may be denied at will or upon the mere speculation of a court or government counsel. In particular, in this case, where the government filed joint criminal charges against Petitioners and where they have retained specific, highly skilled counsel to present a common defense on their behalf, the constitutional guarantee of their right to counsel of choice precludes judicial intervention which undercuts that right.

The government argues that the Sixth Amendment is not violated so long as a defendant receives effective assistance of counsel. [U.S. Br., at 41]. This contention, too, begs the question, for the right to counsel of choice protected by the Sixth Amendment implicates factors and considerations which include but which also go far beyond questions of competence. Rather, the right to counsel here at issue is the Petitioners' right to have

their common defense presented by counsel of choice who are not only highly competent but in whom they have reposed their trust and confidence and with whom they are comfortable and secure at this critical stage in their lives. Put another way, the right at issue is Petitioners' right to choose to be represented by counsel whom, for innumerable practical and personal reasons, they each deem to be the best possible advocate for them in this case.

It cannot be overly emphasized, as many courts have noted, that the identity of specific counsel representing a defendant in a criminal case is of singular importance. Since attorneys may differ as to their skills, manner, style, and the strategies which they may adopt, despite all being within the range of effective advocates, a decision of a defendant to select a particular attorney is safeguarded by the Sixth Amendment:

> "We would reject reality if we were to suggest that lawyers are a homogeneous group. Attorneys are not fungible, as are eggs, apples and oranges. Attorneys may differ as to their trial strategy, their oratory style, or the importance they give to particular legal issues. These differences, all within the range of effective and competent advocacy, may be important in the development of his defense. *Given this reality, a defendant's decision to select a particular attorney becomes critical to the type of defense he will make and thus falls within the ambit of the Sixth Amendment." United States v. Laura, supra,* 607 F.2d at 56. (Emphasis added)[12]

For the government to contend otherwise is to plainly distort reality. The right of a criminal defendant to retain and to be represented by counsel of his choice is funda-

12. *Accord: United States v. Curcio,* 694 F.2d 14, 22 (2d Cir. 1982) ("the right to be represented by counsel of one's choosing has long been regarded as part and parcel of the 'fundamental' right to be heard through counsel.").

mental in the Sixth Amendment. *See, e.g., United States v. Curcio*, 694 F.2d 14, 26 (2d Cir. 1982); cases cited in U.S. Br., at 39n. 34. As is noted in *Curcio*, "the right to counsel of choice has long been regarded as part and parcel of the 'fundamental' right to be heard through counsel. See *Powell v. Alabama*, 287 U.S. 45, 53 (1932)." *Id.* at 22.[13]

Thus, as set forth in their opening Brief, the right to counsel which each Petitioner enjoys has two facets, each based on the Constitution: the defendant's right to counsel of choice and the defendant's right to conflict-free counsel. Since each right belongs to each defendant, each defendant must necessarily have the power to choose which of those rights is to predominate where such rights might be in conflict. Although couched in terms of "waiver," a defendant's determina-

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13. Whether based on the Sixth Amendment right to counsel, or the Fifth Amendment right to due process, *see, e.g., Davis v. Stamler*, 650 F.2d 447 (3d Cir. 1981); *United States ex rel. Carey v. Rundle*, 409 F.2d 1210 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970), or a combination of rights embodied in both amendments, the right of a criminal defendant to the assistance of counsel of his choice is squarely bottomed on the Constitution. *See Glasser v. United States*, 315 U.S. 60, 70 (1941). That the right to counsel includes the right to retain counsel of choice is manifested by myriad decisions contained in Respondent's Brief, at n.34 and, *inter alia*, *United States v. Cicale*, 691 F.2d 95, 106 (2d Cir. 1982); *United States v. Curcio*, 680 F.2d 881, 888 (2d Cir. 1982); *United States v. Hobson*, 672 F.2d 825, 827-828 (11th Cir. 1982). There is no case holding to the contrary. In *Leis v. Flynt*, 439 U.S. 438 (1979), *reh.denied*, 441 U.S. 956 (1979), this Court held only that a lawyer does not have a Fourteenth Amendment property right to represent an individual where that lawyer has not been admitted to the Bar. Here, of course, the rights asserted are those of Petitioners, defendants in a criminal action who wish to secure their right to representation by retained counsel of their choice for the purpose of presenting their common defense. *See, Chandler v. Fretag*, 348 U.S. 3, 9 (1954) ("regardless of whether Petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified".)

tion to elevate his constitutional right to counsel of choice over his right to conflict-free counsel is merely an election by a defendant which must be respected by the courts. *See United States vs. Curcio, supra*, 694 F.2d at 22 and n.8; Petitioners' Initial Brief, at 23 *et seq.*

Most significantly, in this case, there is no conflict of interests. Therefore, there is no need for Petitioners to elect one constitutional right over the other or to waive their rights to effective assistance of counsel. Nonetheless, after an extensive Rule 44(c) inquiry, the District Court found that each Petitioner knowingly, voluntarily, and intelligently waived his right to representation by conflict-free counsel. Under such circumstances, each Petitioner's decision to implement his right to counsel of choice to present the common defense cannot be overriden.

The second smoke-screen seized on by the government to camouflage the absence of legal authority supporting its position is its trumpeting of vague statements to the effect that the representation by counsel would be contrary to ethical standards. This argument cannot withstand reasoned analysis since the claimed violations of ethical standards are based solely upon the potential conflicts of interest arising from the fact of multiple representation and the decision to present a common defense.

The record does not, nor could it, reflect the presence of any actual conflict of interest. Moreover, the record does reflect that each of the Petitioners appreciates the potential conflicts of interest which could theoretically arise from both the presentation of a common defense and representation by chosen counsel to present the common defense and that each Petitioner has knowingly, voluntarily, and intelligently chosen to secure his constitutional right to counsel of choice. Since the case at bar presents no conflicts of interest and since counsel is conflict-free, no reason existed for any Petitioner to waive his right to conflict-free counsel. And as to the

predictions of potential conflicts which are repeatedly raised by the government, such concerns are predicated on no more than the surmises of creative advocates, and not upon any facts of record.

Obviously, were it correct to premise a disqualification order solely on speculative, potential conflicts of interest which might or might not arise where persons jointly charged with a commission of criminal acts choose to present a common defense through unitary counsel, multiple representation would be absolutely barred. The potential for future conflicts of interest exists, and to the same degree, in each case in which defendants choose either to present a common defense or to be represented by a single lawyer. Yet, such conjecture, whether by the government, the trial court, or both, cannot justify the substantial and irreparable incursion into a criminal defendant's fundamental right which inevitably results from the disqualification of his chosen counsel.[14]

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14. The government's inability at this late date to even identify the potential conflicts of interest which, it contends, "lurk in every stage of the proceedings" [U.S. Br., at 54-55 and n.51], highlights the tenuousness of its position. The government merely points to the fact that counsel filed two specific pre-trial motions, neither of which has yet been determined, each of which recognizes the disparity in the quantity of "evidence" possessed by the government respecting each Petitioner. But it is apparent that no conflict exists merely because the government claims to have a larger quantity of "evidence" respecting one defendant jointly charged with other defendants. It is not the "quantity," but the "quality" of the evidence which might create a conflict. A conflict, potential or actual, would come into existence only where the specific "evidence" inculpates one defendant at the expense of another defendant.

Further, the mere fact that a motion for severance has been filed does not disclose a conflict; rather, such a motion merely acknowledges that the government possesses a greater quantity of "evidence" as to one Petitioner than it possesses respecting the other three Petitioners and that, for tactical reasons, counsel would prefer separate trials. Indeed, to the extent that the claimed "conflict" is premised upon the substance of the severance motion, that conflict is easily obliterated by the granting of the severance motion.

The government's response is unpersuasive for yet another basic reason. Even had an actual conflict of interest arising from the joint representation of Petitioners herein been demonstrated, each Petitioner did waive his right to conflict-free counsel in order to have counsel of his choice present his common defense. In their opening Brief, Petitioners noted that the Second, Fifth, and Eighth Circuits have each held that, even in the presence of actual conflict of interests arising from joint representation of defendants charged in the same action, defendants can waive that right in order to have counsel of their choice present their common defense.[15] Since Petitioners' opening Brief was filed, the Sixth Circuit, as well, has adopted this position. *United States v. Reese*, 699 F.2d 803, 805 (6th Cir. 1983). *Accord: United States v. Fox*, 613 F.2d 99, 102 (5th Cir. 1980); *United States v. Unger*, 665 F.2d 251, 256 (8th Cir. 1981).

Respondent relies on two cases for the proposition that Petitioners may not waive an actual conflict and proceed with counsel of their choice. [U.S. Br., at 58n.59] However, since neither of these cases arises in the context of defendant's desires to present a common defense, they are not only distinguishable from but are also irrelevant to the matters here at issue. *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978), as is discussed at length in Petitioners' opening Brief, at pages 20-22, arose in the context of an attorney's representation of a defendant and prior representation of a witness against

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In no event, however, do these pre-trial applications reflect an actual or potential conflict among Petitioners. Moreover, the motions have no bearing on the questions of multiple representation or each Petitioner's determination to present a common defense.

15. *United States v. Curcio*, 680 F.2d 881 (2d Cir. 1982), 694 F.2d 14 (2d Cir. 1982); *United States v. Cunningham*, 672 F.2d 1064 (2d Cir. 1982); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982) *cert. denied*, 103 S.Ct. 77 (1983).

that same defendant. *Dolan* did not involve common defense questions and the witness in *Dolan* refused to waive his attorney-client privilege. In *Dolan*, the defendant and the witness were antagonistic to each other and had never prepared or presented a common defense. Thus, the utilization of information derived from the attorney-client relationship could be waived only by the witness, not by the defendant. Moreover, given the fact that no common defense had ever been prepared by the witness and the defendant, no automatic waiver of the attorney-client privilege occurred. *See*, Petitioners' Opening Brief, at 40-47. Thus, *Dolan* is inapposite. Indeed, Dolan was not able to waive the actual conflict of interest in that case.

The other case cited by Respondent is *United States v. Hobson*, 672 F.2d 825 (11th Cir.), *cert. denied* 103 S.Ct. 208 (1982). *Hobson*, which held that courts of appeal have jurisdiction over pre-trial District Court orders disqualifying counsel chosen by a defendant in a criminal case and that *de novo* review existed over the District Court's conclusions of law on the disqualification issues, also held that the conflict there presented could not be waived. However, the conflict identified in *Hobson* was not one arising from the defendants' decision to present a common defense in the face of criminal charges lodged against them; rather, in *Hobson*, two government witnesses, whom the government represented would testify at Hobson's trial, had sworn to the trial court that Hobson's lawyer had been present when the potential witnesses discussed the commission of the precise criminal acts upon which Hobson was standing trial, thereby creating "a reasonable possibility of an appearance of impropriety on the attorney's part."

Faced with the facts that the lawyer would have to testify at trial, that the government's witnesses would implicate the lawyer in criminal activity, and that such witnesses did not waive any rights or privileges which

they possessed, the *Hobson* court affirmed the trial court's disqualification order.[16]

At bottom, the government's contention that Petitioners cannot insist upon joint representation by counsel of their choice rests on the government's assertion that such joint representation "does not meet established standards of ethical professional conduct." [U.S. Br. at 61.] But, throughout this entire proceeding the government has been utterly unable to demonstrate that such joint representation creates any conflict of interest or is contrary, to any degree whatsoever, to the ethical standards governing members of the Bar. Absent such a showing, the government's position collapses. The mere mouthing of generalizations concerning the purported evils of multiple representation and the citation of academic opinion condemning joint representation will not serve to justify the disqualification of counsel which occurred in this case. Likewise the abstract contention that lawyers who represent multiple defendants cannot be trusted to properly advise their clients as to the propriety or efficacy of multiple representation or of the presentation of a common defense is both wholly unsupportable and patently offensive.[17] The assertion

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16. It must be noted that the *Hobson* court emphasized the fact that Hobson was not being deprived of counsel of his choice: "[D]efendant Hobson was being represented by *two* attorneys of his choice prior to the disqualification of the attorney involved in this case. Our affirmance of the disqualification order in no way deprives Hobson of the continued representation of this other attorney. Thus, in any event, Hobson's right to counsel of choice is only partially affected by our decision." *United States v. Hobson, supra,* 672 F.2d at 829 n.*.

17. Although couched in terms of "ethical standards" and "conflict of interest" issues, the government's position is based on its express belief that a defendant lacks the ability to act in his own best interest and that counsel may fail to fully and properly advise that defendant in order to better serve counsel's personal interests. But it is troublesome to us that the paternalistic concerns advanced by the government in this case, where it is in the prosecution's best

that multiple representation fosters post-conviction attacks on a verdict is similarly irrelevant and cannot serve to justify the denigration of a defendant's constitutional right. Innumerable courts, including this Court in *Holloway v. Arkansas, supra*, have expressly recognized both the propriety and the effectiveness of multiple representation. Thus, neither the government nor the courts, except in the most exceptional circumstances, should be permitted to deprive a criminal defendant of his right to choice of counsel, his right to joint representation, or his right to present a common defense. The disqualification order must therefore be reversed.

III. THE COURTS BELOW ERRED IN DISQUALIFYING THE FIRM OF SPRAGUE & RUBENSTONE BASED ON ITS ACQUISITION OF PRIVILEGED INFORMATION THROUGH THE ATTORNEY-CLIENT RELATIONSHIP

In its Order and Opinion of December 2, 1981, the trial Court made the blanket statement that "defense counsel concedes that 'logic mandates' that the firm of Sprague & Rubenstone must be disqualified should separate counsel be ordered." In fact, counsel had only conceded that, were the Court to require appointment of separate counsel *based on the acquisition of privileged information through the attorney-client relationship,*

NOTE — *(Continued)*
interest to have the firm of Sprague & Rubenstone disqualified and to force the appointment of separate counsel, are not raised by the government in other cases where defendants' waivers of constitutional rights occur with great frequency and, in many instances, absent the presence of counsel. Furthermore, as this Court has expressly recognized, members of the Bar are the primary components through which our system operates and upon which that system is based. As a result, substantial trust has been and must continue to be placed in them. *See Holloway v. Arkansas, supra,* 435 U.S. 485-86.

then "logic would mandate that the firm be disqualified altogether."[18]

This "clarification" was accepted by the trial Court in its Order of December 4, 1981, which stated:

> "Whether or not defendants conceded, based upon the presumption that privileged information has been acquired as a result of the attorney-client relationship [citation omitted] logic does in fact mandate that, if separate counsel are ordered, Sprague & Rubenstone must be disqualified from representing even a single defendant." P.A. 30-P.A. 31.

The fallacy of the lower court's position is that the acquisition of privileged information acquired as the result of the attorney-client relationship by counsel representing multiple defendants jointly charged and presenting a common defense does not permit, much less can it mandate, the disqualification of counsel from representing one, much less all defendants. The fact is that, whether Petitioners are represented by one firm or separate firms, any privileged information shared among counsel raises the self-same potential conflict, and the price paid for sharing privileged information in a common defense situation is the waiver of the attorney-client privilege respecting that information should the common defense break down.

It necessarily follows, therefore, that the Panel Opinion serves to preclude the presentation, under any

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18. As set forth in the Motion for Clarification, granted by the District Court on December 4, 1981, counsel stated:

> "Sprague & Rubenstone extensively examined each of the defendants, jointly and separately, in connection with its representation of each client. Were the court to require appointment of separate counsel for less than all of the defendants based upon potential conflicts, Sprague & Rubenstone would still possess the same information. Were it to continue to represent only one defendant, such information obtained from all four defendants nonetheless would continue to present the same potential conflict now before this court."

circumstances, of a common defense, since a common defense necessarily hinges upon the complete sharing of privileged communications made to counsel, regardless of the number of firms representing co-defendants. Thus, while couched in terms of multiple representation, the Panel Opinion and the position of the United States actually preclude the presentation of a common defense, relying upon a procedural rule to abrogate a trial strategy which has been repeatedly approved by this Court.

Furthermore, the potential conflict arising out of the sharing of privileged information, and only this potential conflict, adheres to any criminal action in which defendants choose to have a common defense presented, whether by one or several law firms. The other "potential conflicts" discussed — opening and closing statements, sentencing, spillovers, possible grants of immunity, nature of the evidence, right to testify, character and reputation testimony (A14-A15, A42-A45) — are not conflicts in any true sense of the word. Rather, these factors represent tactical decisions which must be made by each Petitioner at the time he determines to present a common defense. Most significantly, whether one firm or four firms represent Petitioners, many of these factors are present and to the same degree. But under no circumstances can they be employed to justify the disqualification of counsel in a multiple representation case.

Were the law otherwise, serious practical and legal difficulties would necessarily ensue. Some of these difficulties will be addressed below.

A. Were The Trial And Appellate Courts Correct, There Can Be No Common Defense

As is discussed at length in Petitioners' opening Brief, in many instances in which individuals are jointly charged, strength is gained from a common defense. A common defense is more than two co-defendants adopt-

ing similar legal theories. A common defense is a fusion of co-defendants who work hand in hand to fight against the weight of the government which is brought to bear against them, in expectation that their joint strength is greater than their individual strengths standing alone. In order to best prepare and present the common defense, individual attorneys representing each defendant must have complete access to each defendant, either directly or through their counsel, for the full and frank exchange of privileged information, as if each attorney were representing every defendant, as well as to map out pre-trial investigation activities and to prepare for trial. Were the courts below correct, then each such counsel would necessarily be disqualified from representing his own client based on the obtaining of confidential attorney-client information from each of the other co-defendants. Thus, the necessary result of the holdings of the trial and appellate courts is to eradicate the possibility of preparing and presenting common defenses, for, in the absence of the full and frank disclosure to each attorney of all facts within the knowledge of every defendant, no such defense is practical.

Furthermore, were the courts below correct, the alienation of any one defendant at any point in the proceedings would require disqualification of all defense counsel, whether one attorney or several attorneys, due to their possession of privileged information.

B. Were The Courts Below Correct, There Can Never Be Multiple Representation

Since the obtaining of information through the attorney-client relationship is a primary predicate for the decisions below, it necessarily follows that no attorney can ever represent more than one defendant regardless of the nature of the offense charged or the defense to be raised. For example, if two persons charged with bank robbery were to appear in the office of an attorney stat-

ing that they had been together, out of the country, at the time of the robbery, and presented that attorney with witnesses, affidavits and documents establishing the validity of their alibi, counsel would, nevertheless, be precluded from representing either person because the information gleaned from each had been obtained during the course of the attorney-client relationship.[19]

C. Were The Courts Below Correct, Counsel Would Be Precluded From Communications With Substitute Counsel

Since the primary basis for the decision of the trial and appellate courts below was the acquisition of privileged information through the attorney-client relationship, present counsel would be precluded from meeting and/or conferring with substitute lawyers chosen by Petitioners because the communications from counsel would necessarily be based, in part, on information obtained from each Petitioner through the attorney-client relationship. As a further result, Petitioners would each be put to the payment of additional and substantial expenditures of fees to substitute counsel for the purpose of duplicating the investigative work and legal research activities which had been performed by disqualified counsel. Since scores of hours of interviews with witnesses who had knowledge of facts surrounding the challenged arrests and the persons arrested were conducted *before* federal charges were lodged against Petitioners, the exclusion of such work product from substitute counsel would be tragic. Since many of these interviewees may now not be located by substitute counsel, and since such persons, if located, may not have the clarity of memory which they possessed when contacted

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19. Were the Court below correct, Clarence Darrow would have been disqualified from representing both Leopold and Loeb and from presenting a common defense on their behalf because he had received privileged information from each of them.

by counsel at a time when the events were fresh in their minds, the exclusion of such work product is unthinkable. Yet, it is precisely that result which is compelled by the trial and appellate courts below.

The permutations are endless, and the problems caused as a result of the Opinions of the trial and appellate courts below boggle the mind. These few examples, however, point out the impracticality of the very predicate upon which these decisions are based.[20]

IV. CONCLUSION

For all of the reasons set forth above and in Petitioners' Opening Brief, the Order of the Third Circuit Court of Appeals should be reversed and the matter remanded with instructions that the trial Court proceed with pre-trial matters.

Respectfully submitted,
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20. Indeed, were the courts below correct, counsel could not even effectively interview potential clients. These persons might be involved in a matter for which the firm is already providing representation. Moreover, counsel may be barred from continuing to represent an existing client by dint of information gleaned from a prospective client whose matter, in some way, touches upon the facts resulting in the earlier representation.